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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 217

MIDLAND REALTY COMPANY, A CORPORATION,
Appellant,

vs.

KANSAS CITY POWER & LIGHT COMPANY,
A CORPORATION,
Appellee.

MOTION OF APPELLANT FOR LEAVE TO FILE ADDITIONAL STATEMENT AS TO JURISDICTION.

Now comes appellant, Midland Realty Company, and being advised by the clerk of this Court that there is some doubt as to whether the statement as to jurisdiction, contained in the petition for appeal, fully complies with the rules of this Court, moves and requests that an order be made by the court permitting it to file herein the "Supplemental Statement as to Jurisdiction" herewith presented.

Appellant's counsel, induced by an examination of the forms of petitions for appeal set forth in the recognized authority, Hughes Federal Practice, construed the court's rule as requiring a full statement as to jurisdiction only when the petition for appeal was presented to a justice of

the United States Supreme Court, and not when it was presented to the State Supreme Court. That seemed to be a practical construction of the rule because the judges of the Supreme Court of Missouri, having just considered the case, well knew that there were questions therein arising under the Constitution of the United States, and that the questions were such as, in their opinion, to entitle appellant to appeal to this Court, as a matter of right, under Title 28, Section 344(a), U. S. C. A.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 217

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vs.

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Appellee.

STATEMENT AS TO JURISDICTION.

A.

The statutory provision believed to sustain the jurisdiction of this Court upon appeal is Section 237 of the Judicial Code (Sec. 344 (a), Title 28, United States Code Annotated). Under that statutory provision a review may be had in the Supreme Court of the United States on writ of error (now appeal) as a matter of right, in this case.

The judgment of the Supreme Court of Missouri, Division No. 1, the highest court of the State, appealed from was rendered on April 23, 1936, and the appeal herein was applied for to and allowed by the Presiding Judge of Division No. 1 of the Supreme Court of Missouri and by the Chief Justice of said court on June 27, 1936. Said judg-

ment was that the finding of the trial court be reversed and the cause remanded to the trial court with directions to enter judgment in favor of plaintiff on all counts of its petition as prayed. Such a judgment leaving nothing for the trial court to do other than to perform the ministerial act of entering the directed judgment is a final judgment from which an appeal lies to this Court.

Mower v. *Fletcher,* 114 U. S. 127;
Georgia Ry. & Power Co. v. *Decatur,* 262 U. S. 432;
Rio Grande Ry. v. *Stringham,* 239 U. S. 44.

B.

The nature of this case is thus: On February 27, 1908, appellant entered into a contract, in evidence, with appellee herein for steam heating service at the rates therein named for a term beginning September 1, 1908, and ending August 31, 1918. Appellee furnished steam heat to appellant during the whole term of said contract and appellant paid in full according to the contract for said service.

In the year 1913 there was enacted what is known as the Public Service Commission Law of Missouri (Chapter 33, Revised Statutes of Missouri (1929). On June 19, 1917, appellee filed with the Public Service Commission a schedule of rates for steam heat service, for its customers generally, but no finding or order was made by the Commission with respect thereto. The rates named in that schedule were higher than the rates provided in said contract. Said schedule of rates was filed by virtue of paragraph 12 of Section 5190, Revised Statutes of Missouri 1929, Vol. I, page 1448, which is as follows:

> "Have power to require every gas corporation, electrical corporation, water corporation and municipality to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged

> or enforced. * * * Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, electrical corporation, water corporation or municipality in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. * * * No corporation or municipality shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; * * *"

Thereafter a complaint was lodged with the Commission against such filed schedule of heating rates by certain heat customers (not including appellant) and after a hearing on February 11, 1918, said Commission made a finding and order setting aside the said filed schedule of rates as being unlawful, and promulgating a schedule of heating rates effective March 1, 1918, for appellee's heat customers generally, in which the named rates were somewhat higher than those named in appellant's contract aforesaid (5 Mo. P. S. C. Rep. 664, 683).

Said schedule of rates was promulgated by the Commission by authority of paragraph 5 of Section 5190, Revised Statutes of Missouri 1929, Vol. I, page 1446, which is as follows:

> "* * * Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or

> regulations of any such persons, corporations or municipalities are unjust, unreasonable, unjustly discriminatory or unduly preferential or in anywise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished. * * *"

The statutes above quoted mention only gas and electrical companies but were made applicable to heating companies by Section 5228, Revised Statutes of Missouri 1929.

No complaint was made by appellee or other party concerning appellant's said contract before said Commission or otherwise, and no finding or order was ever made with respect thereto by the Commission or other tribunal. On the contrary, appellee continued to render heating service to appellant and appellant continued to pay for the same in accordance with the contract throughout the full term of the contract, that is to say, the contract was fully performed on both sides.

About two years after the contract had expired according to its terms and had been fully performed, appellee instituted this suit against the appellant in the Circuit Court of Jackson County, Missouri. In the first five counts of its petition herein appellee seeks to recover of appellant the difference between what appellant paid according to contract for heating service in the months of October, November and December, 1917, and January and February, 1918, and what appellee claims that appellant should have paid according to said schedule which was filed, and later, annulled by the Commission. Appellee seeks to recover in the last six counts of its petition herein the difference between what appellant paid according to contract and what appellee claims that appellant should have paid according to said schedule promulgated by the Commission for heating service from March 1, 1918, to August 31, 1918.

The case was tried before the court without a jury. The appellant, in its answer and by requested declarations of law in the trial court, contended that the provisions of said Public Service Commission law so construed and applied as to abrogate and render nugatory its said contract, which was fully performed, without any hearing or finding or order having been had or made by the Commission or other tribunal with respect to said contract, violated and were repugnant to Section 10, Article 1, of the Constitution of the United States, which provides that no State shall pass any law which impairs the obligations of contracts, and violate the Fourteenth Amendment to said Constitution, which prohibits the taking of one's property without due process of law.

The decision of the Supreme Court of Missouri, Division No. 1, was against the contention of appellant and in favor of the validity of said statutes as so contrued and applied.

The constitutional question is a substantial one. Let it be understood that this case does not present the old question, heretofore so thoroughly settled, that the State did not have the right and power to abrogate a private contract with a public utility company which was entered into before the passage of the Public Service Commission law. The question here presented upon the first five counts of plaintiff's petition is, did the mere enactment of the Public Service Commission law and the mere *ex parte* act of the utility company in filing a schedule of rates by virtue thereof, serve to abrogate and render nugatory a contract with said utility company for its service although said contract was fully performed on both sides and although no hearing, finding or order of the Public Service Commission was ever had or made with respect to said contract? The question presented upon the last six counts of plaintiff's petition herein is whether a schedule of rates promulgated by the

Commission for the utility company's customers generally, served, *ipso facto*, to abrogate and render nugatory appellant's said contract for heating service, which was fully performed and concerning which the Commission never had a hearing or made any finding or order.

C.

The cases of *Wichita R. R. & Light Co.* v. *Public Utility Com. of Kansas*, 260 U. S. 48, and *Arkansas Natl. Gas Co.* v. *Arkansas R. R. Com.*, 261 U. S. 379, are directly in point and are contrary to the decision of the Supreme Court of Missouri. Those cases and the following decisions of this Court are believed to sustain jurisdiction in this Court of this appeal:

Baldwin v. *Missouri*, 281 U. S. 586;
First Natl. Bank v. *Maine*, 284 U. S. 312;
Hans Rees' Sons v. *State of North Car.*, 283 U. S. 125;
Chicago, R. I. & P. Ry. Co. v. *Perry*, 259 U. S. 548;
New York ex rel. Bryant v. *Zimmerman*, 278 U. S. 63.

Respectfully submitted,

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